October 25, 2019

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Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: REG 2019-14—Comment on Rulemaking Petition To Require Reporting of Segregated Party Accounts.

Dear Ms. Gyory:

Democracy 21 submits these comments in support of a petition asking the Commission to undertake a rulemaking to provide for new rules to govern reporting by the national party committees of receipts to and disbursements from special purpose political party committee accounts authorized by a provision in the 2015 Omnibus Appropriations Act. We urge the Commission to undertake a rulemaking that addresses not only the reporting rules that apply to these special purpose party accounts, but that also addresses the definitions and restrictions that apply to spending by the party committees from these accounts.

Background

In December 2014, Congress passed an omnibus appropriations bill that included an amendment to FECA wholly unrelated to the budget. *See* Consolidated and Further Continuing Appropriations Act, 2015, Division N, Sec. 101. In this Act, Congress created three new "separate, segregated" political party accounts to be used to pay for (1) presidential nominating conventions, (2) party headquarters building and maintenance and (3) "election recounts and contests and other legal proceedings," with an annual contribution limit (as adjusted for inflation) of $106,500 per account per donor per year (or three times the base party contribution limit), in addition to other permissible party contributions.[1]

[1] Consolidated and Further Continuing Appropriations Act, 2015, Pub.L. No. 113-235, 128 Stat. 2130, 2772 (2014); *see also* 52 U.S.C. §§ 30116(a)(9) (party accounts), 30116(a)(1)(B) (contribution limit) and 30116(c) (increases on limits based on increases in price index).

The national party committee of each party can maintain all three special purpose accounts; each party's two congressional campaign committees can each maintain the building fund and recount fund accounts, for a total of seven special purpose accounts for each party. Thus, an individual can now contribute $213,000 per election cycle to each of a party's seven special purpose accounts, or a total of more than $1.5 million per election cycle to a single party.

Although the Act purports to restrict the use of these funds for specified purposes—*e.g.*, "solely to defray expenses incurred with respect to a presidential nominating convention," "solely to defray expenses incurred with respect to" headquarters buildings, and "to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings"—the Act contains no definitions of such purposes and no disclosure provisions specific to funds spent out of these new accounts.

The Commission has woefully failed in its basic obligation to provide meaningful regulatory guidance on these special purpose accounts.[2] Not surprisingly, in the absence of regulatory requirements, and as detailed in the petition, the parties have engaged in a hodge-podge of reporting conventions about the flow of monies into and out of the accounts, making it virtually impossible for the public to receive meaningful disclosure information. In order to remedy this problem and to prevent abuse of these restricted-use accounts, the Commission should promulgate regulations that not only require uniform, organized and detailed disclosure of these funds to redress the disclosure anomalies illustrated by the rulemaking petition, but also that specify and clarify the rules that govern the permissible uses of these new funds to ensure compliance with the statutory restrictions on them.

A. Disclosure of Party Special Account Funds

FECA requires political committees, generally, to disclose the "purpose" of disbursements in excess of $200. *See* 52 U.S.C. § 30104(b). However, Commission regulations implementing the disclosure of the "purpose" of a disbursement do not require the degree of specificity that is necessary to monitor whether funds spent out of the new restricted party accounts are, in fact, spent "solely" for the purposes stated in the statute.

Under current regulations, examples of statements or descriptions that meet the "purpose" requirement for disbursements by committees other than authorized committees "include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs." 11 C.F.R. § 104.3(b)(3)(i)(B). The Commission's "Examples of Adequate Purposes" document,[3] suggests that committees use codes providing a bit more specificity than the examples listed in the regulation. But neither the regulation nor the "Examples" document requires the specificity that is necessary to monitor and

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[2] The Commission in February 2015 did issue bare-boned "Interim Guidance" to address reporting requirements for these accounts. *See* https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-accounts/. But as illustrated by the examples discussed in the petition, this "interim" guidance is inadequate and has been ineffective.

[3] FEC, *Examples of Adequate Purposes*, http://fec.gov/rad/pacs/documents/ExamplesofAdequatePurposes.pdf.

ensure compliance with the requirement that the party committees use the restricted purpose account funds only for permissible purposes.

The examples discussed in the petition for rulemaking illustrate the inadequacy of the current disclosure by the parties related to their spending from these special purpose accounts, and the need for additional disclosure rules.

We urge the Commission to promulgate new, detailed and uniform reporting and disclosure requirements applicable to the restricted purpose party accounts. The rules should be sufficient to enable the Commission and the public to monitor the party spending from these accounts in order to ensure that funds in these accounts are fully and uniformly disclosed, and used solely for the limited purposes specified in the statute.

B. Permissible Uses of New Party Funds

The Commission, however, should go beyond examining just the disclosure issues related to the special purpose party accounts. The decades since the enactment of FECA are replete with examples of political parties abusing funds that they are permitted to raise outside of the base contribution limits for specified purposes. Without action by the Commission to establish clear regulatory guardrails around these special purpose accounts, the parties are likely to stretch beyond recognition the boundaries of the restricted uses of these new funds. As *Roll Call* explained shortly after the enactment of the new special accounts, "there's little question that party officials will test the new regulations to the fullest, exploring every possible legal avenue to fatten their coffers."[4] That "testing" has undoubtedly been made easier by the fact that the Commission has not even put in place regulations to "test."

Unfortunately, the Commission has too often accommodated past efforts by the political parties to undermine the base contribution limits through the creation and ever-expanding use of special funds. As the district court explained in *McConnell v. FEC*, 251 F. Supp. 2d 176, 196 (D.D.C. 2003), the scandal that was the national party soft money system outlawed by the Bipartisan Campaign Reform Act of 2002 (BCRA) was largely born out of the Commission's AOs 1978-10, which permitted state party committees to allocate the costs of voter registration and get-out-the-vote drives between federal and nonfederal accounts. *McConnell*, 251 F. Supp. 2d at 196.

The history here is very pertinent. What may have appeared at the time to be an insignificant exception to the party contribution limits grew into the loophole that swallowed the rule. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court recognized the Commission's central role in creating the soft money system outlawed by BCRA. The Court explained:

> Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA's definition of "contribution" would have required such

[4] Eliza Newlin Carney, *Parties Poised to Exploit Broad New Rules*, Roll Call, (Jan. 6, 2015), http://blogs.rollcall.com/beltway-insiders/parties-poised-to-exploit-broad-new-rules/?dcz=.

> activities to be funded with hard money, the FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.
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> As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.

540 U.S. at 123-24 (emphasis added) (footnotes omitted) (citation omitted).

The parties, in the Omnibus Appropriations Act, accomplished through legislation the right to set up separate accounts, subject to separate higher contribution limits, for building expenses, legal proceedings, and party conventions. However, history has taught us that the parties will make every effort to expand the permissible uses of these new slush funds and, if successful, will raise exponentially larger amounts of money for these accounts. Just as the *McConnell* Court recognized that the "solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's" contribution limits, 540 U.S. at 126, so too would the Commission's failure to enforce the statutory restrictions on these restricted purpose party accounts enable parties and candidates to circumvent FECA's base contribution limits.

We urge the Commission to strictly define by regulation what activities constitute expenses incurred with respect to: "a presidential nominating convention"; "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and "the preparation for and the conduct of election recounts and contests and other legal proceedings." Consolidated and Further Continuing Appropriations Act, 2015, Division N, Sec. 101(a)(3).

For example, the "operation" of a party headquarters building should be construed narrowly to include only payment of utilities and routine maintenance of an actual party headquarters building—not anything that might happen in a party headquarters building, and certainly not payment of staff salaries or any other expenses for general operation of the party itself, such as data mining or opposition research, as some have suggested might be allowable.[5] The phrase "the preparation for . . . other legal proceedings" should be construed narrowly so as to foreclose party claims that all legal expenses—*e.g.*, routine compliance costs—constitute "preparation for legal proceedings."

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[5] Robert Kelner et al., *National Party 2.0: FECA Amendments in Omnibus Spending Bill Increase Fundraising Power of National Parties*, Covington & Burling Inside Political Law (December 10, 2014), http://www.insidepoliticallaw.com/2014/12/10/national-party-2-0-feca-amendments-in-omnibus-spending-bill-increase-fundraising-power-of-national-parties/.

Finally, the Commission should promulgate a regulation making clear that funds in these restricted purpose party accounts cannot be transferred to other party accounts. Allowing such transfers would render meaningless the statutory requirement that contributions to these accounts that enjoy significantly higher contribution limits are to be used only for restricted, specified purposes. Allowing transfers of these funds to other party accounts where the funds could be used for other purposes would render meaningless both the statutory restrictions on these special purpose accounts as well as the base contribution limits of section 30116. In order to prevent what would clearly be a blatant abuse of these special party accounts, the Commission should expressly prohibit any transfers out of them.

Conclusion

The Commission should grant the petition and initiate a rulemaking to comprehensively address the need for new regulations to ensure that the funds in the special purpose party accounts are subject to full and meaningful disclosure, and are used only for the intended statutory purposes.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

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